

Professional Care, Inc. and District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Employees Union, AFL-CIO. Case 2-CA-19050

19 July 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS**

On 30 January 1984 Administrative Law Judge Eleanor MacDonald issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The General Counsel excepts, *inter alia*, to the judge's failure to find that the Respondent violated Sec. 8(a)(1) of the Act by allegedly threatening, through its agents Young and Friedman, to discharge Roberts if she acted as a union observer at the NLRB election 2 August 1982. The General Counsel contends that the judge's failure to address the issue is clearly erroneous because Young and Friedman did not testify and Roberts' testimony on this issue stands un rebutted. Although the judge failed explicitly to consider the point, the judge generally discredited Roberts' testimony, stating in sec. II,B,5, par. 1, of her decision that "[f]rom a careful reading of the testimony of Binger and Roberts I have decided that the General Counsel's allegations are not supported by the evidence." The judge further stated in sec. II,B,5, par. 2, that, "[i]n sum, Binger's and Roberts' testimony in support of General Counsel's case is internally inconsistent and implausible." We therefore conclude that, though un rebutted, Roberts' testimony concerning alleged threats of discharge was not credited, and thus there is no basis for finding that the Respondent violated the Act as alleged.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, on March 7 and May 26, 1983. The charge was filed on August 13, 1982, and the first amended charge was filed on Febru-

ary 1, 1983.¹ The complaint alleges that Respondent, in violation of Section 8(a)(1), (3), and (4) of the Act, threatened its employee Louise Roberts with discharge if she appeared as a union observer and discharged Roberts because she supported and assisted the Union and testified on behalf of the Union in a Board proceeding. Respondent denies these allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent in August 1983, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation engaged in providing home care services from its office in New York, New York, annually derives gross revenues in excess of \$500,000 and provides services valued in excess of \$50,000 for enterprises located in New York State which enterprises each annually purchase materials valued in excess of \$50,000 directly in interstate commerce or perform services valued in excess of \$50,000 for enterprises located in States other than the States in which they are located. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Service of the First Amended Charge

The General Counsel asserts that the first amended charge was served on Respondent at its New York City office on February 1, 1983.² If, as the General Counsel alleges, Roberts was dismissed on August 2, 1982, the charge would be timely served.³

The General Counsel called Eric Anderson, who testified that he is employed as a messenger by the law firm of Sipser, Weinstock, Harper, Dorn & Leibowitz. He stated that one day at 1:30 or 2 p.m. he was requested by Vicki Erenstein, Esq., of that firm to deliver some papers to Professional Care and then to the Regional Office in lower Manhattan. He went to an office on East 44th or 45th Street and served the papers, but he was refused a "received" stamp on the papers. The person he spoke to identified herself as Ms. Lee. After he left Professional Care he went downtown to the Regional Office to deliver the papers. Later, he informed Erenstein that he had been unable to obtain a company stamp on the papers

¹ The first amended charge alleges a violation of Sec. 8(a)(1) and (4) of the Act. It was filed on February 1, 1983, at the Regional Office. There is a dispute as to when it was served on Respondent and whether the allegation is barred by Sec. 10(b) of the Act. This issue is discussed below.

² The gravamen of this charge is that Roberts was discharged because she testified on behalf of the Union on January 15, 1982 in Case 2-RC-19216.

³ Respondent asserts that Roberts was dismissed on July 30, 1982. Sometime after February 1, 1983, Respondent received a copy of the charge by mail.

but that he did obtain the name of the person to whom he spoke. Anderson signed an affidavit of service dated March 3, 1983, which states that:

On February 1, 1983 at approximately two o'clock p.m. I personally served a copy of the unfair labor practice charge and cover letter . . . upon a company representative of Professional Care, Inc. at its offices at 207 East 45th Street, New York, New York. The representative, a woman, was short, in her mid or late thirties, and had frosted blond hair. I asked her to mark "received" upon a copy of the charge, but she refused to do so. However she did inform me that her name is Elyse Lee.

On cross-examination, Anderson testified that inside the ground floor entrance of the building in which Respondent is located there is a steel coat closet and an arrow painted on the wall pointing upwards with the legend "Pro Care." On the day he served the charge, according to Anderson, he walked up two flights of stairs and saw a receptionist and secretaries. The secretary referred him to Lee whom he found in a little office straight back from the receptionist's desk. Lee gave him her name and then wrote it on a piece of paper which Anderson gave to Erenstein.⁴ He was in Lee's office less than 10 minutes. Anderson pointed to a young woman present at the trial and stated he had seen her in Respondent's office on February 1, 1983, when he served the first amended charge on Respondent. The woman was Diane Stoller.

The charge and letter accompanying it were filed with the Board and are time-stamped by the Regional Office on February 1, 1983, at 9:13 a.m. On both documents, the date has been written in pen over the date printed by the time stamp, apparently to correct an erroneous date printed by the stamp. The actual time-stamped has not been corrected. Anderson testified on redirect that his hours were 10 a.m. to 6 p.m. daily and that he never began work earlier than 10 a.m.

Diane Stoller testified that she is a registered nurse instructor and that she is a trainer-instructor for Respondent. Stoller was present at the trial herein when Anderson pointed her out as having been in the office on the day he allegedly served the Union's first amended charge. She testified that on February 1, 1983, she was not in Respondent's office. Her testimony was based on her appointment records and on a weekly report of her activities submitted to Respondent.

Stoller testified that when one enters the front door of the building housing Professional Care, there is no closet visible. A messenger service occupies the first floor of the building and the second floor is vacant and locked. Respondent's offices are located on the third floor. Lee's office is there; it is large with many windows. The street level door has a large sign reading "Professional Care Inc."

Elyse Gibson Lee testified that on February 1, 1983, she was the New York state executive director of operations stationed in Syosset, New York, the location of

the main corporate office of Respondent. On February 1, she spent the morning in the corporate office and the afternoon in the New York City office. She had never seen Anderson before the day of the instant trial and he never served any papers on her. Lee testified that in her office, she is commonly referred to as Elyse Gibson, her previous name.⁵

The testimony of Respondent's witnesses, whom I credit, shows that Anderson was mistaken as to the physical description of the offices of Professional Care in that he wrongly recollected the layout of the entrance level floor, the floor upon which the offices are located and the description of Lee's office. He was also mistaken as to Stoller's presence.

Having failed to recollect these details when he testified on March 7, 1983, Anderson is not likely to have recollected accurately details of personal service on March 3, 1983, when he executed his affidavit. Further, the Board's time stamp on the charge conclusively establishes that the charge was filed at 9:13 a.m. on February 1, 1983, and thus Anderson's narrative about serving Lee that afternoon is not credible.

I find that, under the General Counsel's theory of the case, the first amended charge was not timely served on Respondent; therefore, the allegation concerning a violation of Section 8(a)(4) must be dismissed as time barred. Moreover, had I considered that allegation, I would have found insufficient credible evidence linking Roberts' discharge in the summer 1982 to her testimony on January 15, 1982.

B. The Events of Summer 1982

1. Testimony of Louis Roberts

Louis Roberts testified that she was hired by Respondent as a home health aide in April 1981.⁶ In October 1981, at the request of Elnora Alford, a union organizer, Roberts signed an authorization card for District 1199. At the Union's request, Roberts testified in the representation proceeding on January 15, 1982. No other employees of Respondent were called to testify by the Union, but four other aides were present with Roberts as potential witnesses. Roberts was asked to serve on the organizing committee and she attended 2 or 3 of its meetings along with approximately 10 other aides. She did not solicit any authorization cards for the Union. At the election on August 2, 1982, Roberts served as union observer. It is not alleged that Roberts was active in any other way during the lengthy union campaign.

⁴ She was married on July 9, 1982. The record shows that numerous witnesses referred to Lee as Elyse Gibson.

⁵ It is undisputed that Roberts had an unblemished employment record and received favorable evaluations from her employer until she was discharged. Home health aides provide personal care and assist patients with shopping, cooking, cleaning, and other tasks. Roberts was employed by Respondent to care for Lovelle Chapin, a cancer patient. Respondent contracted with the visiting nurse service (VNS) to provide home health care service to certain VNS patients. VNS determined the amount and type of care to be given. Respondent hired and trained the home health aides. Patients were told that the aides were supplied by VNS and they were not told that the aides' employer was Respondent.

⁴ This paper was not produced.

According to Roberts, she had been requested by Alford to serve as an election observer and on Monday, July 26, 1982, she asked her coordinator, Deborah Young, if she could be relieved on Monday, August 2, 1982.⁷ Young told Roberts to remind her that coming Friday. Roberts did not inform Young that she wanted the day off in order to serve as a union observer. On Wednesday before the election, Roberts again told Young by telephone that she wanted to be relieved on August 2 and Young said "okay" and asked to be reminded on Friday.

On Thursday, July 29, 1982, Roberts attended an in-service training program given by Respondent. In order to gain admittance to the meeting, Roberts signed in. She walked into the room with two other aides whom she did not know. Roberts' husband did not attend the meeting.

On Friday, July 30, 1982, when Young called Roberts at her patient's home, Roberts reminded Young that she wanted Monday off. Young said this was "okay." Then Roberts told Young that the patient, Lovelle Chapin, had a doctor's appointment Monday and would need someone to come in early and take her to the doctor's office. Roberts asked Young if there were any weekend jobs available, and Young said there were none but that she would put Roberts' name on the list. Roberts had not told Young why she needed time off. Fifteen minutes after this call, Young called again and asked Roberts the reason for her request to be relieved. Roberts replied that she was going to be an observer at the election, and Young replied that she could not do that and that "if I should show up at the election between the hours of 9:00 and 1:00 I would no longer be employed." Roberts said nothing and Young transferred the call to another coordinator, Laurie Friedman, who also told Roberts that if she went to the election between 9 and 1 she would no longer be employed by Respondent.⁸ Roberts did not speak to Gibson that day.⁹ According to Roberts, she did not tell either Young or Friedman that she would not report to work on Monday. She assumed they would get a replacement to care for the patient because Young had approved the time off earlier that week. Roberts did not tell them that she did not care what happened to the patient.

After leaving her job that Friday, Roberts went to the union office to speak to Herbert Binger, vice president of the Union. She arrived there about 2:30 p.m. and was able to see Binger immediately; she told him that Young told her that if she acted as an observer at the election she would no longer be employed. Between 2:30 and 3 p.m., Binger called Professional Care. She heard Binger ask for "relief time" for her and another observer, Lela Howard.¹⁰ When Binger got off the phone, he did not

tell Roberts she had lost her job and Roberts did not ask him whether she did nor did not still have a job. Binger instructed Roberts to go to the election.

Roberts served as an observer for the Union from 9 a.m., with various times off for relief. There were four other observers on behalf of the Union.¹¹ When she attempted to vote she was challenged by Respondent on the basis that she was no longer employed. For the next 3 days after the election, Roberts went to work at her patient's home from 9 a.m. to 1 p.m. She was not contacted there by a representative of Respondent, and on Thursday afternoon about 2 or 3 p.m., Roberts called her employer. She told Young that she had reported to Chapin's home but that no one had called her. Roberts asked, "Is there something I should know?" Young responded that Roberts had been told not to go back to the patient's house and that she would not be paid for those 3 days. Young instructed Roberts to tell the patient to call the visiting nurse service.¹²

2. Testimony of Herbert Binger

Binger testified that he directed the Union's organizational campaign at Professional Care. On the Friday before the election, according to Binger, Roberts told him that the employer "wanted to take back the day that was granted to her because they found out she was going to be an observer for the Union." Binger then confirmed with the Board agent in charge of the election that Roberts' name was on the list of observers. He then called Elyse Gibson at her office. He informed her that Roberts was an observer whose name had been submitted to the Regional Office. Gibson responded that "anybody at Professional Care could be an observer but Louise Roberts" because "Roberts had told her that she did not care if the patient that she was taking care of died and because of that she would be terminated." In response to a leading question by the General Counsel Binger then testified that Gibson said if Roberts "showed up to be an observer for the Union she would be terminated." Binger recalled that he told Gibson that it would not be in the best interests of Professional Care to terminate someone for union activity. On cross-examination, Binger denied that Lee told him Roberts was fired because she said she did not care if a patient lived or died.

Binger testified that he could not recall whether Roberts was still in his office when he finished speaking to Lee, but he was sure he had not given Roberts any advice about what to do or whether to report to work. He did not tell her that if she were fired it would be an unfair labor practice.

Binger acknowledged that no other observers and no member of the organizing committee had been discharged by Respondent. No other unfair labor practice charges have been filed against Professional Care.

⁷ Deborah Young is a supervisor of Respondent. The record shows that coordinators call the home health aides at their jobs every day in order to check their attendance.

⁸ Roberts' hours of work were from 9 a.m. to 1 p.m. The election was held from 9 a.m. to 1 p.m. and 3 to 9 p.m.

⁹ Roberts' affidavit only mentions two requests for time off, on Monday and Friday.

¹⁰ The day before, Alford had told Roberts that her time off to act as an observer "was taken care of."

¹¹ The size of the unit was about 500 employees.

¹² Chapin is weak and requires assistance in personal care and preparing meals, but she can walk around and help herself to some extent. Roberts helped her with laundry, shopping, light housekeeping, cooking, and personal care.

3. Testimony of Elyse Gibson Lee

At the time of the trial Lee was the director of the New York office of Professional Care. On September 20, 1982, she testified in a Board election proceeding that two people had signed Louise Roberts name to gain admittance to the July 29 meeting and that a man in a red shirt came in with Louise Roberts and identified himself as her husband. According to Lee's September 20 testimony, she questioned two men after they entered the meeting and found that both were misrepresenting their status as husbands of Professional Care employees. At least one man was asked to leave and refused. Lee found out that a union agent, Elnora Alford, had signed Louise Roberts' name. Lee never spoke to Roberts about this incident. Lee testified that Roberts did not disrupt the meeting. However, an aide named Joanne Sharpe and various other employees disrupted the meeting by shouting and gesturing; they are still employed by Respondent.

Lee testified that on July 30, 1982, Roberts called the office about 10:30 a.m. and the receptionist turned the call over to Lee saying that Roberts was very upset. Lee was not aware that Roberts had talked to any of the coordinators about taking off from work. When Lee picked up the phone, Roberts was "babbling on about Monday, having Monday off." Roberts kept calling Lee "Ms. Fried man," and Lee several times told Roberts that she was Elyse Lee. Roberts told Lee she would not "stand for this, that she is taking Monday off." Lee asked Roberts what she was talking about, and Roberts replied, "I'm not telling you anything, Elyse, I am telling you that I am not going to work Monday." Lee asked what case she was on and then told Roberts she could not leave the patient alone. Roberts said, "Elyse, I'm not coming in Monday whether the patient lives or dies." After asking Roberts to repeat that statement and hearing Roberts repeat it, Lee told Roberts that she was fired because she was conducting herself improperly. Roberts said, "I'm not going to work," and Lee again said, "You're fired." At that point, Roberts hung up the phone. Lee testified that Chapin was "completely dependent" on the aide's assistance. She stated that the only reason she fired Roberts was Roberts' expressed lack of care for the patient.

After this call, Lee completed a termination notice for Roberts. The document dated July 30, 1982, and signed by Lee states that Roberts was discharged because she stated "would not show on patient 8-2-82 whether patient lived or died."

Lee testified that Binger called her about 4:30 or 4:45 that afternoon.¹³ Binger said that they had a problem, that he wished to straighten the matter out, and that Roberts "didn't mean" what she said. Lee told Binger that Roberts was fired. Then Binger brought up the matter of time off for observers and said that Roberts and Lela Howard needed time off. Lee responded that Roberts had been fired and that she would take care of Howard. Lee also told Binger that she wished he had given her more notice about releasing observers.

¹³ She had already filled out Roberts' termination notice by then.

Lee was present at the election and saw all the union observers. None of them have been discharged.

Lee stated that Respondent sent a replacement for Roberts to care for Chapin on Monday, August 2, 1982. The evidence shows that at 4 p.m., July 30, 1982, Respondent notified VNS that effective August 2 there would be a permanent replacement on the Chapin case.¹⁴ On Tuesday, August 3, at 4 p.m., VNS sent Respondent a TWX message that the case would be placed on hold and no aide should be sent out by Respondent. Lee said the case was put on hold because Chapin was hospitalized.

On cross-examination, Lee stated that she was upset at the Union's disruption of the July 29, 1982 meeting and that the meeting ended in chaos. Lee did not think Roberts was involved in the disruption. Lee was not present at the Board hearing on January 15, 1982, when Roberts testified for the Union in the representation proceeding and she did not know which aides were present that day.

4. Testimony of Nancy Schaedel

Nancy Schaedel is assistant director of the special service department of VNS with responsibility for ensuring that home health aides visit patients as scheduled and provide the service required. Professional Care is one of a number of providers of care with which VNS has a contract.

During the union campaign, Schaedel spoke to Nora Schiadone, a coordinator at Professional Care and its former New York director. Schiadone told Schaedel that she was taking Schaedel's phone call because Lee was involved in trying to prevent the Union from organizing the home health aides. Schiadone said, "they wanted to get rid of the aides who were heavily involved in Union activities." Schiadone was not called to testify.

5. Discussion and conclusions

From a careful reading of the testimony of Binger and Roberts I have decided that the General Counsel's allegations are not supported by the evidence. Indeed, close examination of Binger's testimony on direct examination tends to support Lee's testimony and Respondent's defense herein.

Binger gave two versions of his conversation with Lee. The first, given as a narrative, was that Lee said Roberts could not be an observer because she had made a callous, uncaring statement about her patient and "because of that she would be terminated." The second version, given in response to a leading question by the General Counsel, is that Roberts would be terminated if she turned up as an election observer. These two versions are mutually exclusive. In the first version, the decision had been made to terminate Roberts for her unprofessional remark. In the second, termination would occur only if union activity was pursued. I credit Binger's first version because it was given as part of his uncoached narrative of the events surrounding Roberts' discharge.

¹⁴ Lee stated that communication with VNS is by means of a TWX machine and that communications usually take place in the late afternoon around 4 p.m.

rather than in response to prompting by counsel. Thus, I find that on Friday, July 30, 1982, Lee told Binger that Roberts would be terminated for saying she did not care whether her patient died. I believe Lee told Binger this in response to Binger's attempt to intercede for Roberts and obtain her reinstatement. It follows that I also do not credit Roberts' version of her conversation with Binger. It strains credulity to suppose, as Roberts would have us do, that having allegedly been warned that she was in peril of losing her job if she served as an observer, Roberts did not seek assurances from Binger that she would not be fired if she was an observer. Roberts' version of her talk with Binger is inherently incredible. Further, I find it equally impossible to credit Binger's assertion that he did not advise Roberts whether he should serve as an observer; if Lee had really told Binger that Roberts would be fired if she was an observer at the election, Binger, an experienced and high-ranking union official, would certainly have advised Roberts of her legal rights and of the choices open to her with regard to the election. In sum, Binger's and Roberts' testimony in support of the General Counsel's case is internally inconsistent and implausible.¹⁵

I credit Lee's testimony about Roberts' termination despite Lee's tendency, pointed out by General Counsel, to exaggerate the degree of Chapin's helplessness. Lee's testimony is supported by the documentary evidence and is corroborated by Binger's first version of his conversation

¹⁵ Further, Roberts denied saying anything about her patient living or dying yet Binger testified that Lee mentioned the statement.

with Lee. As to Schaedel's testimony about Respondent's desire to get rid of union supporters, I do not find it significant. The union campaign herein lasted from at least October 1981 to August 1982, yet Roberts' termination was the only one alleged to be caused by union animus. In a unit of 500 employees with many employees more active and vociferous in support of the Union, Respondent could certainly have found some circumstances warranting discharge if it were truly seeking to rid itself of union supporters. Yet all the union organizers and supporters are still on the Professional Care payroll.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

ORDER

The complaint is dismissed in its entirety.

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.